United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1404

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1404

UNITED STATES OF AMERICA,

Appellee,

—against—

HARRY LEVINE BENSON, HERBERT KAMINSKY and MARI-ANN DANISE,

Defendants-Appellants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT HERBERT KAMINSKY

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14/5/76

TABLE OF CASES

OTHER AUTHORITIES

UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA, :

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Brief For Appellant
Herbert Kaminsky

Questions Presented

1. Whether the trial court abused its discretion in denying a defense request for a continuance to obtain the deposition of a foreign witness having evidence highly relevant to critical issues in the case?

2. Whether introduction of other crimes evidence over objection prejudiced appellant's right to a fair trial; and whether it was also error to refuse to instruct the jury, as the defense requested, that appellant was never indicted for or convicted of the other crime?

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (Tenney, D.J.) rendered on August 25, 1976, after jury trial, convicting appellant Herbert Kaminsky of conspiracy to violate Title 18, United States Code, Sections 1343 and 2314 (Count I); transmitting communications in foreign and interstate commerce to execute a scheme to defraud in violation of Title 18, United States Code, Section 1343 (Count II); and inducing a person to travel in interstate commerce in execution of a scheme to defraud in violation of Title 18, United States Code, Section 2314 (Count III). Kaminsky was sentenced to three-year prison terms on Counts I and II to run concurrently with each other and with a five-year prison term imposed on Count III.

STATEMENT OF FACTS

Appellant was indicted and tried together with two co-defendants, Harry Levine Benson and Mari-Ann Danise, who were also convicted of the crimes charged.* The Government

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* The defendant Danise was convicted of the substantive counts as the jury hung on the conspiracy count as to her. Each defendant is prosecuting an appeal from the judgment, and a Joint Appendix has been filed. References to that Appendix are denoted 'A.___' and references to the original record are denoted 'T.___'.

alleged that in December, 1974, the defendants, pursuant to a scheme to defraud, obtained a 9.88 karat diamond and an 8.35 karat emerald, worth $255,000, from their rightful owner, Hans Buhler; that they caused Buhler to travel in interstate and foreign commerce in execution of the scheme; and that they also caused wire communications to be transmitted for this purpose.

The Government's case rested almost exclusively upon the testimony of Buhler, a Swiss jeweler. A second witness, Herbert Sachs, testified only as to certain transatlantic telephone conversations after the alleged swindle had occurred. The remaining two witnesses either laid the foundation for introduction of a document which Buhler and the Government claimed established Buhler's ownership of one of the gems allegedly involved in the swindle (Crowingshield), or testified to other crimes not charged in the indictment (Pollak).

HANS BUHLER, initially described himself as a gemologist -- an expert in precious stones -- who not only bought and sold such stones, but also had an institute in Switzerland for "appraisals and research and expertise on precious stones and jewelry for banks, insurance, private organizations and for the Government". (T.119) Mr. Buhler later amended his characterization by admitting that he was twice convicted of embezzlement and spent time in a Swiss prison after his probation

in one case was revoked. (T.212-216)* He also admitted that in December of 1974 and January of 1975, "it's possible" that he was under investigation in Switzerland for criminal activities, but he "can't remember" the matters under investigation. (T.384)

Buhler testified that in June of 1974, he purchased a large diamond from a Swiss jeweler named Barth for 510,000 Swiss Francs, or approximately $185,000 (T.119-121; 331; 401-402) He variously testified that he paid for the diamond by cashier's check dated July 26, 1974, which was introduced into evidence (T.119-120), that he paid for it in cash (T.236; 401), or that he paid for it both by check and by cash (T.499-500); that his partner in the purchase was a Mr. Nat (T.121) or an unidentified Swiss company (T.294); that the diamond was purchased for $185,000 (T.121; 366-67; 374), or that this purchase price actually covered two diamonds (T.154-155); that he purchased the diamond and subsequently went to New York to have it graded by the Gemological Institute of America (T.121), or that he went to New York to have the diamond graded

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* Buhler admitted that when he was initially interviewed by the FBI he falsely stated that he never served time in prison and that his only record was for driving without a muffler. (T.218) Apparently this misinformation was corrected only when the Swiss authorities informed the Government of Buhler's prior criminal activity and also cautioned that:

> "Due to his previous offenses and the numerous incriminating files at the Zurich Police Command, Hans Buhler must be regarded as a shady character". (T.189-190)

before he purchased it (T.154). This latter change of testi- was necessitated by the fact that the bank document which Buhler claimed evidenced payment of 510,000 Swiss Francs to Barth to purchase the diamond was dated July 26, 1974, or two weeks after a diamond was examined for Buhler by the Gemological Institute of America in New York. (Compare A.132 and G.Ex. 2)

Buhler testified that he had no receipt or bill of sale for the diamond because he didn't need one,* and that while a memorandum was prepared on the transaction by the jeweler Barth, Buhler didn't keep it because "in our trade we throw the memorandum away; we don't keep memorandums". (T.402) Buhler testified, however, that he did keep a memorandum for the 8.35 karat emerald, which he received from a jeweler in India to evidence that purchase. (T.122-23;G.Ex.5)**

Buhler had a document from the Gemological Institute of America in New York showing that on June 14, 1974, a diamond was graded there at his direction. (G.Ex. 2, introduced through Robert Crowingshield, T.93-100) The stone was also cut in New York to make it flawless. Before cutting, it was 9.90 karats, and after cutting, it was 9.88 karats. (T.91)

Buhler testified that in December, 1974, he left Switzerland for Los Angeles after declaring for export an 8.35

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* "I don't need a bill of sale. I paid cash. Here are the goods and here is the cash." (T.401)

** This turned out to be a printed form in the German language with all pertinent information on it (including the seller's name), handwritten by Buhler.

karat emerald and a 9.90 karat diamond. (T.123) A report of the Gemological Institute of America in Los Angeles showed that on December 12, 1974, a 9.88 karat diamond was examined there for Kalmun Von Czazy, who, Buhler testified, was a friend who had paid for the examination. (T.126) Buhler claimed he then took the stones to New York City. He did not insure them or arrange for a bank transfer, but carried them in his pocket. (T.249-253) Although he testified that he declared the stones upon arrival in Los Angeles and could provide full documentation reflecting their legal entry into the United States (T.231; 441-42), Buhler never produced any such documentation and the Government was forced to concede, after directing a Los Angeles Customs Office records search, that Buhler in fact never declared the stones when he entered the United States (T.663-64).

Buhler testified that while in New York City, his broker, Hans Furer, called from Switzerland. (T.129) Buhler then went to the offices of Mari-Ann Danise and introduced himself to her. (T.132) Danise introduced him to a man named Herbie, who asked to see the diamond. (T.132) Buhler called Switzerland and spoke first to Furer and then to a James Brito. On direct, Buhler testified he made the two calls to determine whether he could show stones to Herbie and whether he could give them to Danise. (T.132-34) On cross, he admitted that it was possible that no names were mentioned in the first conversation. (T.238-240) He later stated that in the second conver-

sation, no names were mentioned (T.452-453)* Buhler gave the diamond to Herbie to take it out of Danise's office for an appraisal. (T.134-136) Though Herbie initially didn't want to give a receipt for the stone, Buhler ultimately obtained one. (T.137)** It was only after Buhler handed the stone over to Herbie and Herbie left that Buhler asked Danise what Herbie's last name was. (T.139) Buhler testified that Herbie was the appellant Kaminsky. While Buhler was in Danise's office, Furer sent a telex offer of diamonds to Danise, which Buhler discussed with her. (T.138)

Buhler testified that appellant called him a short time after he left Danise's office for the appraisal, and they fixed a price of $19,800 a karat for the diamond.*** Appellant called a second time, saying that he had a buyer for the diamond at $22,800 a karat (or $225,264). (T.139-40) The $3,000 a karat

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* Sachs, the other Government witness, contradicted Buhler on this point. According to Sachs, Buhler was supposed to go to Danise's office to discuss a telex offer of diamonds from Furer to her, and not to discuss a 9.88 karat stone. (T.574) Sachs testified that Brito learned of the alleged transaction in the large stone from Furer. (T.576)

** A defense expert witness testified that no one in the diamond trade would release a stone of this value on a signature memo only; that a cash memorandum (i.e., one where the potential buyer gave the seller cash in the amount of the stone's value together with his receipt) would be required; that even with a cash memorandum, the seller of a stone of this value would permit an appraiser's examination to take place only in a vault or at the Diamond Dealers' Club. (T.645-650)

*** Buhler had testified the diamond cost $185,000, or $18,724.70 a karat. At $19,800 a karat, or $195,624 total price would yield a gross profit of $10,624. Buhler stated that a 7% commission to Furer was owing on the profit (T.262,365), which would reduce it to $9,880.32. When this was split (cont'd)

price difference was to be appellant's commission on the sale. (T.140) Thus, according to Buhler's initial testimony, he was willing to pay a $29,640 commission to appellant on a sale where his own gross profit was $4,940.16.* Buhler later changed his testimony to claim that the $185,000 purchase price actually covered two diamonds, one of which he sold for $12,000, and hence that he actually bought the 9.88 karat diamond for only $173,000. (T.154-155; T.329-331)**

Buhler testified that shortly after the phone conversations, appellant returned with Harry Levine Benson, who was introduced as the buyer of the diamond. (T.141) Buhler testified he gave back appellant's receipt for the diamond and obtained one from Benson to the effect that Benson received from him a 9.88 karat diamond for $22,800 a karat (or $225,264) (T.143) He was told that the stone was now in a safe. (T.141-142) Buhler was to fly to Chicago with Benson to pick up the sale price. (T.142)

*** (cont'd)
with Buhler's partner, Buhler's gross profit would be $4,940.16 on the transaction. An investment of $185,000 in a five-month certificate of deposit at 10% interest would have yielded $7,770, and would not have necessitated cash outlays in excess of $ 1,300 for two transatlantic flights and hotel expenses. (T.265-266)

* Buhler had also testified that he quoted appellant a price of $19,300 a karat -- about $5,000 less than the $19,800 a karat price would have brought. (T.317) At this rate, his profit on the sale would have been no more than $3,000.

** If, however, the $12,000 from the sale of the second diamond is used to reduce the price of the large diamond, this only means that Buhler got zero profit on the small stone and the $22,000 profit figure is actually profit on the sale of two stones, not just on the sale of the large diamond.

Before Buhler left, he agreed to give appellant the emerald in exchange for appellant's $30,000 commission. (T.144) Buhler's receipt for the emerald bore a price of $31,000. (G.Ex.5) Thus, according to Buhler, he agreed to give up a $31,000 emerald for appellant's $30,000 commission on the diamond sale, thereby reducing his already small profit on the transaction by another $1,000. As with the diamond, Buhler later claimed that the price for the emerald actually included a second emerald. (T.337)

Buhler testified that he accompanied Benson to Chicago to pick up the $225,000. (T.145-161) While in Chicago, Benson told him that he bought the emerald from appellant and would now give Buhler a receipt for both stones. (T.166) According to Buhler, Benson took back the receipt which stated he owed Buhler $22,800 a karat for the diamond (or $225,264) and gave him a new receipt, which he himself wrote and Benson signed, stating that Buhler was owed $255,000 for the diamond and the emerald. (T.166-168) Why the additional $28,736 was now owed to Buhler for an emerald he had already traded to appellant in exchange for appellant's $30,000 commission* was never explained. Buhler merely asserted that the new price of $255,000 was "very clear said before. It was for the diamond, $255,000". (T.275; T.279). At this price, the diamond was being sold to Benson not for $19,800 or even $22,800 a karat, but for $25,809.72 a karat.

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* I.e., the price difference between $19,800 a karat and $22,800 a karat.

Buhler testified that in Chicago he learned from Benson that the money was not available there, and, after complaining to appellant and Danise by phone, he flew to London at Benson's direction in order to collect it in that city. (T.145-171) En route to London, he went to New York to Danise's office to complain that the money had not been turned over in Chicago. (T.175-177) According to Buhler, Danise and appellant assured him the money would be paid in London, and told him that they guaranteed the transaction. (T.176-77)

Buhler testified that when he arrived in London and spoke to the man Benson told him was holding the money, he was told not only that no money had been left for him, but that Benson was unknown to that individual. (T.179) Buhler called Danise, who said there must be a misunderstanding. (T.179-80) Benson then called Buhler, and wanted to meet Buhler in London under conditions that Buhler did not agree to, so Benson said he would pay Buhler in Switzerland. (T.180-181)

Buhler stated that he returned to Switzerland and called Danise, who again said she guaranteed the transaction. (T.182)* Buhler testified that Benson did not come to Switzerland and he called Danise, who said she had the money and would

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* Buhler said that while in Switzerland he also spoke to Furer, Swiss broker, to James Brito, who was a friend of Furer, and Herbert Sachs, Brito's lawyer, about the transaction. (T.181-182) According to Sachs, Furer and Brito executed an agreement to split a $15,000 commission on Buhler's sale of the diamond. The emerald was no part of the deal. According to Buhler, Barth's commission was 7%, but $15,000 is not 7% of any figure which Buhler gave as the profit on the transaction. (T.567-569)

bring it to Zurich. (T.182) The next day, they spoke again and Danise said she was afraid to bring that amount of cash on a plane. (T.183) She also refused to put the money in a bank, send it by Wells-Fargo, or hand it to Brito's lawyer's partner for delivery to Switzerland. (T.183) Buhler testified that he then sent a telex, and spoke to appellant and Danise after its receipt. (T.185) Appellant told Buhler "he doesn't like the telegram or this telex at all. He doesn't want to be responsible for the home [sic] transaction." (T.185) Danise later told Buhler to come to New York and he did so. (T.186)

Buhler testified that when he arrived in New York and went to Danise's office, Benson called and said he was in Las Vegas and had used the stones as collateral for a $132,000 gambling debt. (T.191-193) Buhler then threatened to go to the FBI, and appellant asked him not to. (T.193) According to Buhler, appellant then had Danise type an agreement, which she signed, stating that she, representing a firm called Chaos Limited,* agreed to pay Buhler $255,000 in three installments during January, 1975. (T.193; G.Ex. 20) Buhler stated that when he went to get the first installment of $50,000, he was told to go to Las Vegas, where Benson had $60,000 and where

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* James Brito, whom Buhler said he spoke to in Switzerland before he dealt with Danise initially and afterwards about collecting the money, was the president of Chaos Limited. (T.517) Buhler named Brito as a defendant in a civil suit he brought (but has not pursued) for the value of the two stones, and also had Brito arrested in Switzerland in January of 1975. (T.281-82)

Danise and appellant would put up $50,000 against the gambling loss if he would put up the rest. (T.197) Buhler refused to put up cash, but offered to give checks he was carrying instead.* His offer of the checks was not accepted. (T.197)

According to Buhler, Danise gave him money to go to Las Vegas and he did so after he called the FBI (t.202-204) A man named Shaw went with him and took the $50,000 put up by appellant and Danise. (T.197) Benson called him in Las Vegas and they made arrangements to meet. (T.205) Benson refused to tell him where the stones were and also said he sent Shaw back to New York with the $50,000 (T.206-207) They arranged to meet later in the day, but Benson did not show up then or at a subsequent appoingment made for him by Danise. (207-208)

In addition to claiming that he was swindled out of the two stones in this case, Buhler also had claimed that $110,000 in cash was stolen from him in South America the month after he bought the diamond. (T.247) He denied, however, that the money was payment for the diamond and the robbery report a ruse to avoid paying the commission due on the sale of the stone. (T.248)

After Buhler identified the Swiss jeweler Barth as the person through whom he bought the diamond (T.331 and T.401-402), counsel for the co-defendant Benson stated that he had Barth interviewed in Switzerland by a private investigator,

* Buhler testified the checks did not belong to him but belonged either to a man in Switzerland or his friend Von Czazy in Las Vegas. (T.356) They had also been drawn on a bank which had gone bankrupt. (T.357)

who reported that Barth stated he had never sold Bunler a 9.8 karat diamond. (A.99) Counsel asked for a five-day continuance to allow him to obtain a passport and fly to Switzerland to depose Barth. (A.103) Although the trial court initially indicated Barth's testimony would be highly material on the issue of Buhler's credibility (A.105), it ultimately refused to grant any continuance to obtain the testimony. (A.128) The trial court also disagreed with counsel's contention that Title 18, United States Code, Section 2314 only applied to cases where a rightful owner of property is fraudulently induced to part with it. (A.141-142) A motion to depose Barth after trial (A.82-86) was denied, the court holding that there was no showing that Barth was willing to testify by deposition,* or that his testimony would be material to any matters at issue in the case. (A.86a) A motion to set aside the verdict on the ground that the defense had been denied the continuance to secure Barth's testimony was also denied. (A.188, et seq.)

HERBERT SACHS testified that he was an attorney who represented James Brito, the president of Chaos Limited. (T.517) Brito had him come to Switzerland in December of 1974, and told him that he was a finder on a diamond deal. (T.532-33) At Brito's direction, he called Danise to find out when the transaction would be finalized and Buhler paid. (T.534) He and Buhler had conversations with Danise about whether Danise would bring or send a sum of money to Switzerland, or whether Sachs' partner would pick it up in New York, or whether Buhler would go to New York for it. (T.534-542) Sachs had one phone conversation with appellant, in which he asked appellant to insure

* Counsel had stated in that motion that Barth was willing to be deposed. (A.85)

insure that Buhler got paid, and appellant told him:

> ". . . he would act as a friend, that he was not involved in this transaction; that he didn't want any part of the commissions and that he would see to it or try to see to it that everything could be done to insure that Mr. Buhler got paid." (T.543)

On cross, Sachs admitted that he represented Brito, who had been detained by the Swiss authorities on Buhler's complaint, and who was named by Buhler as a defendant in a civil suit to recover $255,000. (T.549-552; T.565)

Over objections summarized in Point II, infra, ISAAC POLLAK testified that, in 1969, he met an attorney named Liewoitz, whose name he either got from a college professor or picked out of the Yellow Pages when he was in need of legal representation.* (T.588; 602-609) Liewoitz called Pollak in May of 1975 and bought jewelry from him on May 19th. (T.589) Later in May, Liewoitz introduced him to Frank Must, whom he identified as appellant. Pollak later obtained two diamond bracelets for them. (T.590-92) Liewoitz called him again for additional merchandise. On two subsequent occasions he met with Liewoitz and appellant, and on each occasion gave appellant jewelry and got a receipt from Liewoitz for it. (T.592-597) Pollak wanted Liewoitz to sign for the merchandise because he "was the individual I knew and he would

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* The Government later determined that Liewoitz did not have offices at the address where Pollak claimed to have visited him. (T.603)

be responsible for them." (T.897-898) The appellant was to meet him to pay for the merchandise two days later, and failed to do so, after making and cancelling three appointments. (T.598-599) Liewoitz later called and told him he could redeem part of the merchandise for $25,000. (T.600)*

After Pollak's testimony, defense counsel moved for an instruction to the jury that the appellant was never arrested, indicted or convicted of the offense about which Pollak testified. The request was denied. (T.615)

After a day of jury deliberation, a guilty verdict was returned against appellant on all three counts of the indictment.

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* This testimony came in on the issue of appellant's wilfullness and intent. See Point II, infra.

POINT I

The Trial Court Abused Its Discretion In Denying A Defense Request For A Continuance To Obtain The Deposition Of A Foreign Witness Having Evidence Highly Relevant To Critical Issues In The Case.

Whether Buhler was actually the lawful owner of the diamond he claimed was taken from him by fraud was a critical issue in this case.

If, as counsel argued below, Section 2314 applies only where property is obtained by fraud from the legitimate owner, then Barth's testimony -- that Buhler did not purchase the diamond from him as Buhler claimed to have done -- was critically important, if not dispositive, on whether a crime under the statute* had in fact been committed.

Even if Section 2314 is construed to protect an unlawful possessor of property in his wrongful possession, Barth's testimony contradicting Buhler's claim of lawful ownership was still essential on the issue of Buhler's credibility -- the pivot issue in the case.

The Government had repeatedly argued that Buhler's record of past dishonesty could be disregarded in this case because the Government "will prove beyond any question that he was the legitimate owner of those two very valuable jewels. . ." A.145)** Thus the Government tried the case on the theory that,

* Appellant's prison term was imposed on the Section 2314 count.

** See also Government summation at A.147-149, where, after successfully opposing defense efforts to obtain Barth's testimony, the Government argued that it had introduced ample evidence to prove that Buhler in fact owned the stones.

to overcome the harm to Buhler's credibility resulting from his history of dishonest dealings, it had to convince the jury that Buhler's testimony could be credited because he was the legitimate owner of the diamond -- a question which, in reality, was never resolved because the defense offer of proof on that very issue was opposed by the Government and rejected by the trial court.

(a) Section 2314 was not Enacted to Protect Rogues in Their Dishonest Dealings With Each Other.

The second paragraph of Section 2314, the basis for Count III of the indictment, was added to the statute in 1956. The intent of Congress in enacting the 1956 amendment is set out in House Report 2474 (1956 U.S. Code Cong. and Admin. News, 3036-3039, A.111-114):

> "Each year many of our citizens are cheated by confidence men. As observed in the Attorney General's communication to the Congress, in many instances the targets of these unscrupulous criminals have been retired persons, widows and also business and professional men. These people lose large sums of money to this group of criminals. The committee is of the firm conviction that our laws must be peak level of effectiveness in order to deal with these criminals and protect honest citizens from their operations." (A.113)

Prior to 1953, New York State had a false pretenses statute which, like Section 2314, was designed "to reach the evil disposed persons whose subtle stratagems, threats and devices have enabled them to obtain money, goods and merchandise 'to the great injury of industrious families and to the manifest prejudice of trade and credit'". People v. Tompkins, 186 N.Y.

413, 415 (1906) (Emphasis in the original) Until the New York statute was amended by the legislature, the New York courts uniformly held that, because of the clear and limited legislative purpose in enacting the false pretenses statute:

> "Neither the law or public policy designs the protection of rogues in their dealings with each other, or to insure fair dealings, as between each other, in their dishonest practices. The design of the law is to protect those who, for some honest purpose are induced, upon fraud and false representations, to give credit or part with their property to another, and not to protect those who, for unworthy or illegal purposes, part with their goods." McCord v. People, 46 N.Y. 470, 472 (1871)

In Tompkins, supra, 186 N.Y. at 416, the New York Court of Appeals acknowledged that arguments could be made for applying the statute to cover dishonest dealings between thieves.* However, it held that ". . . these arguments, impressive as they are, simply suggest that it is the province of courts to give effect to existing rules of law and not to legislate . . . [for] the remedy is not with the courts but in the legislature".

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* The court recognized that in larceny cases, the common law rule was that stealing property from a thief was a crime. People v. Tompkins, supra, 186 N.Y. at 417. However, obtaining property by false pretenses did not constitute larceny at common law, and was punishable only if made criminal by statute. What constitutes the crime of false pretenses in a given jurisdiction depends upon the statute setting forth the crime. 32 Am. Jur. Section 180, p. . This distinction has been held "of primary importance" in federal cases arising under Chapter 115 of 18 U.S.C. See Ackerson v. United States, 185 F.2d 485, 488-490 (8th Cir. 1950), and cases cited, holding that if title to an automobile is obtained by false pretenses, then a car is not "stolen", and the defendant is not guilty of a crime under Section 2312, 18 U.S.C.

Appellant submits that given the explicit legislative purpose in enacting Section 2314, this statute does not apply in a case where property is obtained by false pretenses from one not in rightful possession of the property. Like the former New York false pretenses statute, the legislative history of Section 2314 proves that it was not designed for the protection of rogues in their dealings with each other, or to insure fair dealings between thieves in their dishonest practices.

Research has disclosed no federal case dealing directly with this question. In United States v. Handler, 142 F.2d 351 (2nd Cir. 1944), this court assumed that even in cases prosecuted under the first paragraph of Section 2314 (the transportation in interstate commerce of property obtained by fraud), the act:

> ". . . forbids the transportation across state lines, with guilty knowledge, of goods which have previously been taken from their rightful owners by dishonest acts of the character described." 142 F.2d at 354 (Emphasis added)*

The Handler case quotes with approval a definition of the term 'stealing' used in various federal statutes, making clear that the term is used in the statutes "to denote any dis-

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* The court also held that while Section 2314 originally covered only stolen property (i.e., that taken larcenously), the Congress broadened the definition to include also felonious takings by fraud and consequently "intended to extend the coverage of the Act beyond what would have been reached by the word 'stolen'." 142 F.2d at 353. Thus, as in Ackerson, supra, this Court acknowledges that the legislative intent is of critical importance in determining the reach of Chapter 115, 18 U.S.C. statutes.

honest transaction whereby one person obtains that which rightfully belongs to another, and deprives the owner of the rights and benefits of ownership . . ." See also Brown v. United States, 411 U.S. 223, 230 n. 4 (1973), where the Supreme Court dismissed out of hand petitioners' argument that they had standing to raise a Fourth Amendment claim by virtue of a property interest in stolen property.

The only other federally reported case, Levin v. United States, 338 F.2d 265 (D.C. Cir. 1964), does not interpret the United States Code, but a D. C. Code provision which, the court held, defined "the crime of larceny, . . . an offense against the possession rather than the ownership of property". The court held that:

> ". . . under the terms of our statute, as distinguished from those of certain other jurisdictions, the ownership of the property does not matter." 338 F.2d at 268*

Thus, once again, the court acknowledges that in dealing with a false pretenses case, the critical question is the intended scope of the statute under which the defendant is prosecuted.

In this case, Buhler attempted to establish his rightful ownership of the diamond by his testimony that he bought it through Barth, and by the copy of a bank record (G. Ex. 4; A.132)

* Moreover, the indictment in that case actually charged a taking from the true owner -- a union -- and the fact that the union official was a trustee ex maleficio, rather than ex contractu, was deemed of no legal significance. (338 F.2d at 268) In the case at bar, it was never alleged that Buhler was a trustee of the true owner.

showing a 510,000 Swiss Franc withdrawal on June 26, 1974, and carrying Buhler's handwritten notation that it was to Barth for purchase of the diamond. In fact, when specifically asked how, without a receipt or bill of sale from Barth, he would be able to prove that the diamond was not stolen property, he claimed he would be able to do so through Barth.* By precluding the defense from introducing Barth's deposition denying that he had ever dealt with Buhler in the sale to him of a 9.88 diamond, the trial court excluded precisely the evidence which would prove that Buhler's testimony of legitimate acquisition of the diamone, and his production of G.Ex. 4 (A.132), was a total fabrication.

Appellant submits that Section 2314, under which he was convicted and imprisoned, was not conceived or enacted in order to cover a situation where the "victim" is not the rightful owner of the property obtained by fraud. "If the Federal Government is to engage in combat against fraudulent schemes not covered by the statute, it must do so at the initiative of Congress and not of this Court." United States v. Maze, 414 U.S. 395, 406 n.10 (1974) For this reason the trial court's refusal to permit a five-day continuance to take Barth's deposition in Switzerland was prejudicial error, as this evidence was essential to prove that Barth was not the lawful owner of

* "Q. . . . but suppose the next day somebody said that was a stolen diamond; prove where you got it.

A. Not from a company like Barth in Zurich, who is one of the biggest jewelers in Zurich." (T.401-402)

the diamond.

(b) Under the Government's Own Theory of the Case, Buhler's Credibility on all Issues Depended upon Convincing the Jury that He Was the Legitimate Owner of the Diamond.

Even assuming that Section 2314 applies to insure fair dealings as between thieves, as well as to protect honest citizens in the lawful ownership of their property, it nonetheless was error for the trial court to refuse a five-day continuance of the trial so that the defense could secure Barth's deposition* that Buhler never purchased the diamond through him. This evidence was material because the Government used Buhler's uncontradicted claim of ownership as proof that Buhler was telling the truth about the remainder of the alleged fraudulent transaction. (A.145; A.147-149, supra, at 16)

Under the Government's own theory of the case, it was essential to convince the jury of Buhler's legitimate ownership of the stone in order to convince them that he had, in fact, been the victim of the swindle he testified to. This strategy had to be adopted, because without something** to redeem Buhler's credibility -- which had been well shredded by the conclusion of his testimony -- it is highly doubtful that the jury would have convicted the appellant Kaminsky in

* Contrary to the Government's assertions below that no procedure existed whereby a foreign national not subject to a subpoena could be deposed in Switzerland, this type of situation has never prevented a deposition in a criminal case when necessary. See United States v. Mosca, 355 F.Supp. 267, aff'd. 475 F.2d 1052 (2nd Cir. 1973).

** See also Point II, where we argue that the other crimes evidence was improperly used for this purpose.

this case, as proof of his involvement rested only on Buhler's word.

The witness Sachs was able to corroborate Buhler's testimony only as to phone calls to Danise to collect from her the money Buhler claimed was owing on the diamond deal. Sachs testified that on the only occasion he spoke to appellant, appellant told him he was not involved in the transaction. (T. 543, supra, at 14 ,*

Moreover, if the jury had known that Buhler was not the legitimate purchaser of the diamond, they could also have discredited Sachs' testimony about his role in the whole affair.

If the jury believed that Buhler was an illegal possessor of the diamond, then they could also have concluded that Sachs not only had advised Brito on how to collect a substantial commission from the sale of stolen property, but had also taken an active role in the negotiation to obtain the illicit commission. Sachs had testified he advised Buhler that an agreement to pay for the diamond "could be drawn in a certain way [and] would make the matter strictly a civil matter". (T.583) In the context of Buhler's illegitimate possession of the stone, this testimony could have been interpreted by the jury as proof that Sachs was interested not only in securing the document to obtain Brito's commission on the sale, but was eager to do so in a manner insuring that Brito would not be subject to criminal liability for facilitating

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* This was appellant's position throughout the trial. (See A.135, 137; T.633)

a sale of stolen property.

Refutation of Buhler's claim of lawful ownership would also draw into question the legitimacy of the Buhler-Danise introduction by Furer and Brito. The jury could have concluded that they sent Buhler to Danise not as a legitimate seller of diamonds, but for the dubious purpose of disposing of stolen property.*

The whole complexion of the case would have changed had the jury been aware that Barth categorically denied having any dealings with Buhler in the sale of a 9.88 karat diamond.** As in United States v. Seijo, 514 F.2d 1357, 1364 (2nd Cir. 1975), Buhler's false concealment of his actual acquisition of the diamond, and his fabrication of a document to lend credence to his perjury, "generates doubt concerning the rest of the evidence he delivered against the appellant." The false testimony "renders the uncorroborated substance of his testimony suspect," -- a matter of critical importance in this case, as appellant was convicted solely upon Buhler's uncorroborated testimony of his criminal involvement in the transaction.

The absence of the impeaching evidence proving not only that Buhler lied about a material fact, but also that he

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* The reason for the commission agreement between Furer and Brito to split $15,000 on the sale, and not 7% of the profit as Buhler claimed was due to Furer, becomes obvious in the context of an illegally possessed diamond.

** The successful line of impeachment the defense developed at trial -- that Buhler had lied about declaring the stones when he entered the United States -- also was substantially diminished in impact when Barth's testimony was excluded. The trial court ruled that he would instruct the jury that this fact "only goes to his credibility, and the fact he may not have declared it doesn't mean that he couldn't be swindled out of it". (T.622)

fabricated a document (G.Ex. 4; A.132) to support his perjury also prevented defense argument and request for instructions on the negative inferences which the jury could draw from such fabrication. As Professor Wigmore notes, fabrication of evidence by a witness "is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit". II Wigmore on Evidence, Section 278, p. 120.

Appellant submits that the trial court abused its discretion in refusing the defense request for a five-day continuance to obtain Barth's deposition. There was an ample showing that Barth's testimony was material and that it could be obtained in a reasonable period of time. Compare United States v. Bronson, 145 F.2d 939, 943 (2nd Cir. 1944), where the trial would have been delayed two years; United States v. Costa, 425 F.2d 950, 952 (2nd Cir. 1969), where the court found the request for continuance to be a tactic on appeal rather than a request for time to obtain information helpful to the defense; and United States v. Izzi, 427 F.2d 293, 296 (2nd Cir. 1970), where the court characterized the request for a continuance as "whimsical".

In two recent cases, this Court has held that improper exclusion of testimony material to the defense affected a substantial right of a defendant. United States v. Dwyer, _F.2d_ , Dkt. 76-1108 (2nd Cir. July 26, 1976); United

States v. Robinson, —F.2d— , Dkt. No. 76-1177 (2nd Cir. October 29, 1976). Certainly in the context of this record, the erroneous exercise of discretion to prevent proof of facts critical to the defense cannot be disregarded as harmless under Fed. R. Crim. P. 52(a). Kotteakos v. United States, 328 U.S. 750, 764-65 (1946)

POINT II

Introduction of Evidence of Other Crimes, Over Objection, Prejudiced Appellant's Right to a Fair Trial. It Was Also Error to Refuse to Instruct the Jury, as Requested, that Appellant was Never Indicted or Convicted of the Other Crime.

The prosecution was permitted to prove that appellant took jewelry from Isaac Pollak on two occasions subsequent to the crime alleged in the indictment. (T.586-613) The court admitted the evidence on the theory that "if the jury finds that he participated, then his intent and wilfullness become issues". (A.136) It also gave a limiting instruction to that effect. (T.586-587)

The defense opposed the ruling on the ground that appellant's intent and wilfullness were not really in issue in the case. (A.137-138)* He also asked the court to consider the nature of the Government's proof already presented in order to determine whether this highly prejudicial evidence was really necessary for proof of the Government's case. (A.138)

* ". . . in effect you are saying since this is a criminal case, it would apply in every single criminal case because in every case don't you have issues of intent and wilfullness? You must ask yourself . . . whether there is any real contest in this case, bottomed on the claim that the defendant Kaminsky acted unknowingly or by mistake or without guilty intention on his part; or whether the defense is not that Kaminsky was not involved at all in the transaction. I submit under the latter defense, which is our defense, this proof is not relevant on the issue of intent and wilfullness because there is no real contested issue on that score and you must assess the Government's need for such proof in light of the defense." (A.137)

At this argument, the Government took the position that the evidence was admissible on the issue of appellant's wilfullness and intent because the facts "could be construed by someone as a business transaction that went awry, and that where the difficulty for the Government to convince the jury that there actually was involved here a scheme to defraud, that the similar acts . . . are particularly probative for circumstantial evidence of this intent and wilfullness". (A.140) However, in arguing its case to the jury, the Government found no such difficulties with the evidence. The Government told them:

> "Where is the fraud? Ladies and gentlemen, the government submits to you that these defendants smell of fraud. Not one thing that happened from December 23rd through January 6th had any sense of legitimacy about it. Every step of the way was fraudulent. From the first minute when the defendant Danise introduced the defend- and Herbert Kaminsky as Herbie, and then told Buhler later his name was Herbie Ky, not Kaminsky, to the last minute, when the witness Hans Buhler went to Las Vegas to pick up his money but the money wasn't there. From start to finish. Every step of the way was fraud, ladies and gentlemen." (T.688-689)

And, of course, the Government was correct. Once the jury decided that Buhler was a credible witness and that his testimony about what transpired could be believed, there was no way for them to find that this might have been a legitimate business transaction gone awry.* By crediting Buhler's testimony,

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* Counsel for Kaminsky acknowledged this when he argued that even if Kaminsky were at Danise's office, "mere presence at the scene of an alleged crime is not enough to fasten criminal liability on someone, and it's not enough even to be a knowing spectator." (T.719)

the jury had to find, as the Government forcefully argued, "this wasn't a legitimate business transaction from step one to the last step. Every step of the way was fraud and deceit". (T.699)

Pollak's testimony actually had only one role in the case, also pointed out by the Government in summation:

> "But Isaac Pollak shows you something else, ladies and gentlemen. Buhler wasn't the only one swindled. Pollak was swindled, too." (T.698)

We submit that the defense objection to the Pollak testimony was well taken, and that the other crimes evidence should have been excluded. Intent and wilfullness were not in issue in the case -- as the Government forcefully pointed out in summation. Moreover, the alleged subsequent crimes were not sufficiently similar to the crime alleged in the indictment to be probative of that non-issue. In this case, proof of the subsequent crime served only an improper purpose -- "to show a design or scheme to 'commit crimes of the sort with which [the defendant] is charged'". McCormick on Evidence, p. 449 (1972 Ed.)

The cases dealing with the question of when intent and wilfullness are "in issue" so that other crimes evidence is admissible as proof of these elements, demonstrate that the court below erred in admitting such evidence for this purpose in the case at bar, even with a limiting instruction.

United States v. De Cicco, 435 F.2d 478 (2nd Cir. 1970), like this case, involved a Section 2314 violation. As

in this case, the prosecution was permitted to prove that the defendant had committed prior similar crimes in order to show that he acted wilfully in the case on trial. (435 F.2d at 482) The Court acknowledged the well-established rule that knowledge, design and intent can be placed in issue at trial "either by the nature of the facts sought to be proved by the prosecution or the nature of the facts sought to be established by the defense". (435 F.2d at 483) Holding that neither situation was present, the Court reversed the conviction.

The Court's analysis of the error committed in the De Cicco case is applicable to this case in all respects. In De Cicco, as here, the defense did not raise any issue of mistake, absence of knowledge, or lack of intent. (435 F.2d at 484) As in this case, "the defense's only hope was to attack [the government witness's] credibility and thereby raise a reasonable doubt about the veracity of what the defendants did or said". (435 F.2d at 484) Indeed, in this case, as in De Cicco, a frontal attack on Buhler's credibility was the only defense possible, for if his testimony was accepted as credible, it led "ineluctably to the conclusion that the defendants knew what they were doing". This case, like De Cicco, is not one where, if Buhler's story is accepted at face value, "the statements and acts of the defendants lead to equivocal inferences". In this case, as in De Cicco, whatever minimal value the other crimes evidence added to the Government's case on the issue of appellant's intent was totally outweighed by

the unwarranted inference that Buhler could be believed when he said appellant swindled him, because the appellant did the same kind of thing to Pollak six months later.

In United States v. Fierson, 419 F.2d 1020 (7th Cir. 1969), a conviction was reversed where other crimes evidence received on the issue of intent, was not warranted because intent was not actually in issue. The court held that to justify admission of such evidence, "it is necessary that wilfullness and intent be more than merely formal issues in the sense that the defendant is entitled to an instruction thereon". 419 F.2d at 1023. And where the Government has more than ample evidence to take the case to the jury, "a plea of not guilty cannot, by itself, be construed as raising such a keen dispute on the issue of wilfullness and intent so as to justify admission of this type of evidence". (Ibid.)*

Certainly in the case at bar, the Government, by its own argument in summation, had more than ample evidence to take the case to the jury. Here, as in Fierson, it seems obvious that the Government sought to prove that appellant was involved in the Buhler swindle by evidence, through Pollak, that he engaged in similar conduct six months later.

United States v. Ring, 513 F.2d 1001, 1005-1009 (6th Cir. 1975) contains a cogent analysis of the use of other crimes

* See also United States v. Byrd, 352 F.2d 570, 575 (2nd Cir. 1965), also holding that intent becomes sufficiently in issue only when put in issue by the defense or where proof of the offense "would contain little or nothing from which an inference of guilty intent could be drawn".

evidence to prove intent. The court reversed in that case, holding that introduction of such evidence is improper where "evidence of intent is inferable if the proscribed act is proven and defendant does not claim mistake or inadvertence". See also United States v. Miller, 500 F.2d 751, 762-763 (5th Cir. 1974), holding other crimes evidence improperly received on the issue of intent in a case where, "If the jury believed that [appellant] actually performed these acts, they logically would infer from that conduct that he possessed the requisite criminal intent."

Not only was there no real issue of intent or wilfullness warranting admission of other crimes evidence on this basis, but the Pollak transaction was not sufficiently similar to that testified to by Buhler to be probative even on this spurious issue.

Buhler testified that appellant was the middleman in sale of jewelry by him to Benson. Pollak testified that appellant was the buyer of jewelry, vouched for by an old friend and attorney, Anthony Liewoitz. More importantly, no attempt to cause Pollak to travel in interstate or foreign commerce was shown. Buhler had testified that the participants in the fraudulent transaction induced him to travel from New York to Chicago to London to Zurich to New York to Las Vegas to collect the money due on the sale. But Pollak merely testified that appellant took the jewelry and never showed up in New York to pay for it. The only common elements

in the two transactions were that appellant and jewelry worth substantial amounts of money were involved.

This Court has held that, "The probative value of similar acts used to prove wilfullness or intent is dependent on the existence of a close parallel between the crime charged and the acts shown." United States v. Leonard, 524 F.2d 1076, 1091 (2nd Cir. 1975) Introduction of other crimes evidence "may not be justified as bearing on intent" where the conduct involved "is not of sufficient similarity to that alleged in the indictment to be admissible". United States v. Beno, 324 F.2d 582, 587 (2nd Cir. 1963) In Beno and in United States v. Broadway, 477 F.2d 991 (5th Cir. 1973), convictions were reversed where other crimes evidence not of sufficient similarity to be probative of intent was introduced on that issue. See also Bullard v. United States, 395 F.2d 658 (5th Cir. 1968), also reversing on this ground.

United States v. Broadway, supra, like the case at bar, was a Section 2314 case. There, as other crimes evidence, the Government offered proof that the defendant falsely executed certain money orders without proof that he caused them to be transported in interstate commerce. (477 F2d at 995) The court reversed, holding that an essential element of a Section 2314 violation or of a similar offense is the "essential ingredient of transportating or causing to be transported . . ." (Ibid.) As this was lacking in the other crimes proof, the two acts were not similar acts.

The Broadway situation was duplicated in this case. Pollak testified to a fraudulent taking of jewelry but not to any fraudulent representations or promises inducing him to travel in interstate or foreign commerce in execution of the scheme. The evidence was inadmissible because:

> ". . . When proof of an assertedly similar offense is tendered to establish necessary intent, the other offense proved must include the essential physical elements of the offense charged . . ." United States v. Broadway, supra, 477 F.2d at 995.

Since proof of one essential physical element of the offense charged, "the essential ingredient of transporting or causing to be transported was lacking" in the Pollak transaction, the other crimes evidence was without probative value on the issue of intent in this case.

Assuming that the other crimes evidence was admissible though intent was not in issue, and that the dissimilarity between the Pollak and Buhler transactions did not render the Pollak evidence inadmissible on the intent non-issue, we further submit that the trial court erred in refusing the defense request (A.141) to instruct the jury after Pollak testified that appellant had never been indicted or convicted for the alleged other crime.

The fact that appellant had not been indicted or convicted on the Pollak transaction went to the weight the jury could accord this evidence and to Pollak's credibility. c.f. Pilcher v. United States, 113 Fed. 248, 249 (5th Cir. 1902), holding that the fact a defendant had been acquitted

of other crimes proved at a subsequent trial to establish intent:

> ". . . could rightfully be considered by the jury in passing upon the credibility of the witnesses testifying on this trial. . ."

This is also the rule in a majority of states. People v. Griffin, 58 Cal. Rptr. 107, 111 (Calif. 1967); State v. Calloway, 150 S.E.2d 517 (N.Car. 1966); State v. Smith, 532 P.2d 9 (Ore. 1975); Womble v. State, 258 A.2d 786 (Md. 1969)

The prosecution is required to prove by clear and convincing evidence that a defendant has committed the similar criminal act, not just that someone has accused him of it. United States v. San Martin, 505 F.2d 918 (5th Cir. 1974) An instruction that appellant had never been convicted of the crime Pollak claimed appellant committed was necessary, as counsel argued below, to dispel any erroneous notion the jury might form that Pollak's evidence was anything more than an accusation of other criminal conduct.

The judgment appealed from must be reversed because of the errors in admitting the other crimes evidence, and because it cannot be said that these errors, properly objected to below, can be disregarded as harmless in the context of this case. United States v. Kotteakos, supra.

POINT III

Pursuant to Rule 28(i), F.R.A.P., Appellant Adopts the Points of Counsel for the Co-Defendants Which Also Apply to Him.

CONCLUSION

For all the foregoing reasons, the judgment appealed from must be reversed and the case remanded for a new trial.

Dated: New York, New York
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Respectfully submitted,

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